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Ariz. R. Crim. P. 31.24



DIVISION ONE
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RUTH WILLINGHAM,
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 09-0529
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
)
CHARLES LEE ROGGENBUCK,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2008-166932-001 DT

The Honorable Lisa Roberts, Judge *Pro Tempore*

CONVICTIONS AND SENTENCES AFFIRMED; JUDGMENT MODIFIED

Terry Goddard, Arizona Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Suzanne M. Nicholls, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Karen M. Noble, Deputy Public Defender
Attorneys for Appellant

J O H N S E N, Judge

¶1 Charles Lee Roggenbuck appeals the superior court's imposition of consecutive sentences for attempted first-degree murder and aggravated assault. For the reasons set forth below,

we affirm the convictions and the resulting sentences but modify the judgment.

FACTS AND PROCEDURAL HISTORY

¶2 Roggenbuck surprised a Phoenix woman inside her home one afternoon.¹ He grabbed her, held a knife to her throat, walked her over to the front door and demanded she lock it. The victim refused and grabbed the blade of the knife, at which point Roggenbuck pulled down on the knife, injuring her hand severely. Roggenbuck then again told the victim to lock the door, but instead of complying, she attempted to open the door and scream for help. Roggenbuck slammed the door shut, prompting the victim to cry out for assistance. Incensed by the victim's defiance, Roggenbuck said, "I'm going to . . . kill you," and stabbed the knife into the victim's chest. She fell to the floor, and Roggenbuck dragged her toward the bedroom. The victim escaped, and police subsequently apprehended Roggenbuck.

¶3 A jury found Roggenbuck guilty of attempted first-degree murder, a Class 2 dangerous felony; aggravated assault, a Class 3 dangerous felony; burglary in the first degree, a Class 2 dangerous felony; and kidnapping, a Class 2 dangerous felony.

¹ On appeal, "[w]e view the evidence in the light most favorable to sustaining the verdicts and resolve all inferences against appellant." *State v. Nihiser*, 191 Ariz. 199, 201, 953 P.2d 1252, 1254 (App. 1997).

At his sentencing hearing, the court found that Roggenbuck had three prior felonies, two of which were violent offenses pursuant to Arizona Revised Statutes ("A.R.S.") section 13-706 (2010).² The court also found that the four current convictions constituted violent felonies under the law. See A.R.S. § 13-706(B), (F)(2)(a), (c), (h), (n). As a result, the court sentenced Roggenbuck to imprisonment for life on each of the four charges. The court ordered the sentences for the aggravated assault, burglary and kidnapping convictions to run concurrently with each other, but consecutive to the life sentence for attempted first-degree murder.

¶4 Roggenbuck timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2010), and - 4033(A) (2010).

DISCUSSION

¶5 Roggenbuck argues the superior court erred in sentencing him to consecutive life sentences for his convictions of attempted first-degree murder and aggravated assault because the charged offenses were "inseparable" and part of "continuous and uninterrupted criminal conduct that had a single criminal objective."

² Absent material revisions after the date of an alleged offense, we cite a statute's current version.

¶16 "An act or omission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent." A.R.S. § 13-116 (2010). We review *de novo* whether a superior court has complied with § 13-116 in imposing consecutive sentences. *State v. Urquidez*, 213 Ariz. 50, 52, ¶ 6, 138 P.3d 1177, 1179 (App. 2006).

¶17 In determining whether a defendant has committed a single act pursuant to § 13-116, the Arizona Supreme Court has explained that it first

consider[s] the facts of each crime separately, subtracting from the factual transaction the evidence necessary to convict on the ultimate charge—the one that is at the essence of the factual nexus and that will often be the most serious of the charges. If the remaining evidence satisfies the elements of the other crime, then consecutive sentences may be permissible under A.R.S. § 13-116. In applying this analytical framework, however, we will then consider whether, given the entire "transaction," it was factually impossible to commit the ultimate crime without also committing the secondary crime. If so, then the likelihood will increase that the defendant committed a single act under A.R.S. § 13-116. We will then consider whether the defendant's conduct in committing the lesser crime caused the victim to suffer an additional risk of harm beyond that inherent in the ultimate crime. If so, then ordinarily the court should find that the defendant committed multiple acts and should receive consecutive sentences.

State v. Gordon, 161 Ariz. 308, 315, 778 P.2d 1204, 1211 (1989).

¶18 Roggenbuck and the State agree that attempted first-degree murder was the "ultimate charge" in the case. Thus, applying the first element of *Gordon*, we consider the facts necessary to convict Roggenbuck of attempted first-degree murder. Attempted first-degree murder required proof that Roggenbuck intentionally or knowingly engaged in premeditated conduct that would have caused the death of the victim if the attendant circumstances were as Roggenbuck believed them to be. A.R.S. §§ 13-1001(A)(1) (2010), -1105(A)(1) (2010).

¶19 The evidence at trial was that Roggenbuck told the victim, "I'm going to . . . kill you, you're going to . . . die" and then stabbed her in the chest. Subtracting this evidence from the factual scenario described above, we must determine whether the remaining evidence would support Roggenbuck's conviction of aggravated assault, the lesser offense. To convict Roggenbuck of this crime, the State was required to prove he "[i]ntentionally, knowingly or recklessly caus[ed] any physical injury to" the victim and the injury was serious; a deadly weapon or dangerous instrument was used; or the assault caused temporary but substantial disfigurement, temporary but substantial loss or impairment of any body organ, or part or a fracture of any body part. A.R.S. §§ 13-1203(A)(1) (2010), -1204(A)(1)-(3) (2010).

¶10 Setting aside the evidence necessary to sustain the attempted first-degree murder conviction, Roggenbuck slashed the victim's hand with a knife, causing an injury that required surgery and three months of physical therapy. This evidence was sufficient to convict Roggenbuck of aggravated assault. Thus, the first element of the *Gordon* analysis is met.

¶11 Contrary to Roggenbuck's assertion, the harms he inflicted upon the victim in this case are not akin to the repetitive, indistinct and identical blows administered in a fist fight. The hand wound that resulted when Roggenbuck raked the knife along the victim's fingers and the wound caused when he later plunged the knife into her chest are different in severity; there is no contention, for example, that the hand wound would have caused the victim's death. Moreover, the acts were separated in time and motivated by different stimuli. Roggenbuck cut the victim's hand because she grabbed the blade in self-defense. He stabbed her in the chest after she refused to lock the door and instead cried for help.

¶12 Next we determine whether it was factually impossible for Roggenbuck to commit the ultimate crime, attempted first-degree murder, without also committing the secondary crime of aggravated assault. *Gordon*, 161 Ariz. at 315, 778 P.2d at 1211. Mindful of the distinction in time and in nature between Roggenbuck's first slicing the victim's hand and then stabbing

her in the chest, we hold that on the facts presented, it was possible for Roggenbuck to attempt first-degree murder without also committing aggravated assault.

¶13 Roggenbuck, however, argues that any act that would constitute attempted first-degree murder necessarily also would constitute aggravated assault. But this argument is based on the statutory elements of the two crimes, rather than on the facts in the record. *Gordon* requires us to analyze the particular facts to determine whether multiple crimes occurred, and teaches that we cannot without analysis simply conflate a defendant's various acts into one criminal episode. See *id.* at 315-16, 778 P.2d at 1211-12. As demonstrated above, the aggravated assault and the attempted first-degree murder were two distinct crimes committed at different times by Roggenbuck. The victim's testimony makes clear that Roggenbuck already had committed aggravated assault by slicing her hand before she cried for assistance, prompting him to plunge the knife into her chest.

¶14 Roggenbuck further argues that the record does not disclose whether the jury would have convicted him of attempted first-degree murder absent the evidence we have held constituted aggravated assault. But nothing in *Gordon* compels us to speculate about what the jury found or might have found. Under *Gordon*, we look simply at the evidence *necessary* under the law

to convict the defendant of the respective crimes. *Id.* at 315, 778 P.2d at 1211. Roggenbuck's threat to kill the victim and subsequent stabbing her in the chest are sufficient to convict him of attempted first-degree murder apart from the aggravated assault that resulted in injury to the victim's hand.

¶15 Lastly, *Gordon* requires us to determine whether Roggenbuck's aggravated assault caused the victim to suffer a risk different from or additional to that inherent in attempted first-degree murder. See *Gordon*, 161 Ariz. at 315, 778 P.2d at 1211 ("[I]f the perpetrator's conduct . . . caused the victim to suffer a risk of harm different from or additional to that inherent in the ultimate crime, such conduct weighs in favor of . . . allowing consecutive sentences."). The aggravated assault resulted in severe injury to the victim's hand; this harm is sufficiently different from the harm inherent in attempted first-degree murder, death, to satisfy *Gordon*.

¶16 Roggenbuck argues that because the risk of attempted first-degree murder is death, the risk of an aggravated assault necessarily cannot be greater than that. But under *Gordon*, the harm inflicted by the lesser offense need not be greater than the harm inherent in the greater offense. Instead, the test is whether the harm is "different from or additional to" that inherent in the greater offense. *Id.* In *Gordon*, the defendant kidnapped and raped the victim. *Id.* at 315-16, 778 P.2d at

1211-12. Reasoning that the ultimate crime was rape, the court held that consecutive sentences were appropriate because the defendant did more than merely restrain the victim while raping her, he beat her. *Id.* It concluded that consecutive sentences were permissible even though the different harm suffered by the victim as a result of the kidnapping, being restrained and beaten, was not necessarily greater than the inherent risk of the rape. *Id.* at 316, 778 P.2d at 1212.

¶17 Our interpretation of the rule is supported by *State v. Cornish*, 192 Ariz. 533, 538, ¶ 20, 968 P.2d 606, 611 (App. 1998). The defendant in that case was charged with burglary and attempted aggravated assault. *Id.* at ¶ 19. Concluding that the ultimate crime was attempted aggravated assault, the court affirmed the imposition of consecutive sentences because “[t]he harm done by [the burglary,] an unwanted intrusion[,] . . . is separately cognizable, and separately punishable, from the harm inflicted [by the attempted aggravated assault,] a violent attack inside the home.” *Id.* at ¶ 20. See also *State v. Runningeagle*, 176 Ariz. 59, 67, 859 P.2d 169, 177 (1993) (“[Defendant’s] conduct in committing the burglary caused the victims to suffer an additional risk beyond that inherent in the killing: one crime presented a risk to property, the other presented a risk to life.”).

¶18 Roggenbuck finally argues the superior court improperly aggravated his sentences by ordering them to run consecutively based upon its finding that the victim's physical injuries were an aggravating factor, in violation of A.R.S. § 13-701(D)(1) (2010), which provides that "[i]nfliction or threatened infliction of serious physical injury" may not constitute an aggravating factor if it is an essential element of the offense.

¶19 But the court did not decide to impose consecutive sentences because it concluded the sentences should be aggravated. A court is not required to find aggravating circumstances in order to impose consecutive sentences. An aggravated sentence may increase the length of a prisoner's incarceration up to the maximum extent of the sentencing range. See generally A.R.S. § 13-704 (2010). In contrast, a consecutive sentence is statutorily mandated, "unless the court expressly directs otherwise." A.R.S. § 13-711(A) (2010); see also *Gordon*, 161 Ariz. at 315, 778 P.2d at 1211. As noted in the answering brief, given that the court was imposing consecutive life sentences pursuant to A.R.S. §§ 13-116 and -706(B), it addressed the issue of aggravating circumstances only in response to the prosecutor's request for purposes of any future post-conviction proceedings.

¶20 Nevertheless, we agree the superior court erred in finding the victim's physical injuries constituted an aggravating circumstance. Section 13-701(D)(1) prohibits a sentencing court from finding that an element of aggravated assault or attempted first-degree murder constitutes an aggravating circumstance.

CONCLUSION

¶21 We conclude the superior court acted within its authority in imposing consecutive sentences. Accordingly, we affirm Roggenbuck's convictions and resulting sentences, although we modify the judgment to vacate the superior court's finding that the victim's physical injuries constituted an aggravating circumstance pursuant to A.R.S. § 13-701(D)(1).

/s/
DIANE M. JOHNSEN, Judge

CONCURRING:

/s/
DONN KESSLER, Presiding Judge

/s/
SHELDON H. WEISBERG, Judge